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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 554

THE SCAM INSTRUMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JURISDICTION.

The judgment of the Court of Appeals was entered on May 15, 1968 (pp. 12, 17, *infra*). Rehearing was denied on June 26, 1968 (p. 18, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether payments received by an employee in excess of the actual cost of an illness or accident under the terms of a union negotiated hospitalization plan are terms and conditions of employment.

Whether an employer during the term of a collective bargaining agreement has an obligation to bargain with a union concerning a plan to eliminate what was an unintended aspect of insurance coverage.

STATUTE INVOLVED.

The statutory provisions involved are Sections 8(a)(1) and (5) and 8(d) of National Labor Relations Act as amended, 61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C. Sections 158 and 159. They are printed in Appendix A, p. 11, *infra*.

STATEMENT.

This case was presented to the Court of Appeals on Petition of the Board (R. 1) to enforce its Order against Scam (petitioner here) pursuant to the National Labor Relations Act, as amended (61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C., Sections 151 *et seq.*). The order of the Board resulted from the usual procedure upon charges against Scam filed by Local 1031, International Brotherhood of Electrical Workers, AFL-CIO. The Trial Exam-

iner's Intermediate Report was adopted by the Board without making any specific comments of its own, holding that Scam violated Section 8(a)(1) and (5) of the Act by unilaterally modifying the benefit payment schedule of a group health insurance policy which Scam was required to carry for its employees under its collective bargaining contract with the union. The Court of Appeals affirmed the Order entered by the Board (pp. 12, 17, *infra*).

Since May of 1955, the union has represented the production and maintenance employees in the Company's Skokie, Illinois plant. The most recent collective bargaining agreement between the parties contained a provision under which the Company agreed to provide certain designated insurance coverage for the representative employees at its own expense (J. A. 82-84).

In February of 1965, the Company and its insurance carrier agreed to the addition of a rider to the insurance policy that provided the required coverage. The rider added a "non-duplicating" provision to the medical coverage portions of the policy (J. A. 7-8; 31-32, 35-38, 85-88). The Rider provided for the coordination of benefits when there was additional group insurance coverage provided by another employer in the form of contributions by that employer and/or payroll deductions. The Rider did not provide for non-duplication of all insurance coverage, but was limited solely to the situation where there were two group insurance plans covering one employee that had been provided through an employment relationship.

During the first week of May, 1965, the union informed the Company that the union objected to the execution of the insurance rider. While the matter was under study by the Company the union filed a grievance under the provisions of the collective bargaining agreement. The parties were unable to settle their differences through the griev-

ance procedure and the union advised the Company that it wished to carry the matter to arbitration. An arbitrator was selected. However the hearing before the arbitrator was continued on different occasions and the union filed the charges against the Company, the subject matter of this instant case.

The Trial Examiner concluded that Scam had unilaterally changed existing terms and conditions of employment and thereby violated Section 8(a)(1), 8(a)(5) and 8(d) of the Act through the addition of the non-duplicating rider to the insurance contract. The Board adopted the Intermediate Report of the Trial Examiner and the Court of Appeals affirmed the Board's Order.

REASONS FOR GRANTING THE WRIT.

The question involved is one of major importance, not only to Petitioner, but also to literally thousands of other employers who provide insurance coverage to their employees through collective bargaining agreements. The proposition that an employer must bargain over the removal of an unintended dollar profit from insurance coverage is a novel one for which there is no precedent. The issue in this case is concerned with the extent to which the interpretation of "wages, hours and other terms and conditions of employment." The mandatory subjects for collective bargaining of Section 8(a)(5) of the National Labor Relations Act can be broadened to include every subject in which any employee could conceivably have an indirect interest as a result of the Court's decision. This concern over the extension of the duty to collective bargaining is not occasioned by a lack of regard for collective bargaining as a means for settling disputes, but rather, by the conviction that there must be some aspect of business or industrial life which need not pass through the crucible of negotiation with the labor union before becoming effective.

Only a little reflection is required to realize that extending the theory contained in the decision of the Court of Appeals to its logical conclusion must inevitably bring all industrial and commercial activity of unionized employees to a shuttering and chaotic halt.

Even the majority of the Supreme Court in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964), expressed some concern over this tendency when it stated as follows in upholding a Board order:

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). *Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.*" 379 U. S. 215. (Emphasis supplied.) (Footnote omitted.)

Mr. Justice Steward in his concurring opinion in which Justices Douglas and Harlan joined, expressed even graver concern, saying:

> "The phrase 'conditions of employment' is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history.
>
> * * * * *
>
> "Only a narrower concept of 'conditions of employment' will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. * * *" 379 U. S. 221.

The Court's decision misinterpreted the obligation of Scam to provide insurance coverage. The collective bargaining agreement and the schedule of benefits attached thereto only required Scam to provide medical and hospital coverage up to a stated maximum. Scam agreed with the union to provide this coverage but there was no direction as to how the coverage was to be provided. Scam was free to change insurance carriers or to modify any contractual provision with its insurance carrier so long as the scheduled maximum coverage was provided. The duty that the collective bargaining agreement imposed upon Scam was only to provide the scheduled coverage. The addition of the non-duplication Rider in no way reduced the amount of coverage available to Scam employees, but simply eliminated the unintended dollar profit paid to a small minority of employees who had coverage for themselves or their dependents through some other group insurance contract provided by an employer other than Scam. After the addition of the Rider, the amount received by the Scam employees was not reduced below the coverage agreed upon between the Company and the Union. The Court's decision rejected Scam's contention that the issue presented was whether the elimination of the unintended dollar profit was or was not within those areas imposing a mandatory duty to bargain. The Court held that the right to add the non-duplicating Rider was not unilaterally available during the contract term. This position is inconsistent. The matter before the Court either concerned a mandatory deal to bargain, thereby prohibiting action by Scam, or it did not concern a mandatory duty to bargain, thereby allowing Scam to provide the agreed upon insurance coverage as it so determined. Matters that are not specifically covered in a collective bargaining agreement are subject to bargaining only if they come within the statutory definition of conditions of employment.

The Court's ruling is contrary to that of the Fourth Circuit in *Westinghouse Electric Corp.* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4) at 548, 550, where the Court said in refusing to require the employer to bargain concerning increases in prices charged on coffee and meals served in the Company plant under a contract with an independent caterer:

> "In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this Court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject *has a significant or material relationship to wages, hours or other conditions of employment.*
>
> The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider 'vital'. Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a widespread industrial practice."
>
> • • • • •
>
> "*In the view of the majority of this Court, it was not the intent of Congress in enacting the National Labor Relations Act to sweep every act by every employer within the ambit of 'conditions of employment.'* The dissenting members of the Board pointed out, in effect, that equating the trifles here involved with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting 'conditions of employment' is sheer nonsense. Efforts to apply a theory such as the Board adopted in Weyerhaeuser to clearly inappropriate situations should be discouraged where the reasons for such attempted applications are, as charged by the petitioner, absurd and mischievous. Balanced and effective collective bargaining should be the ultimate objective. The statutory

> purpose may best be served by formulating and applying a reasonable concept of 'conditions of employment' in determining subjects of mandatory bargaining. (Emphasis supplied.)

The foregoing reasoning of the Fourth Circuit recognized a legal distinction between those subjects which have a material or significant impact on wages, hours or other conditions of employment and those which are only indirectly, incidentally or remotely related to those subjects. To fail to recognize this distinction would impose a duty upon every employer to bargain collectively over virtually every managerial decision since each to some degree has its impact upon the employees. The decision of the Court in this case contemplates "bargaining" simply for the sake of bargaining, apparently on the theory that mere discussion may serve as a valuable prophylactic. This represents a vast departure from the statutory definition of collective bargaining as interpreted by this Court. If employers and unions are bound to discuss anything and everything that either of them or any of their constituents considers an irritant simply for its therapeutic effect, then truly this decision has completely rewritten the statute. This definition of a mandatory subject for bargaining actually poses a threat to effective and meaningful collective bargaining which is a backbone of federal labor policy.

It is submitted that upon review of the record considered as a whole, as required by *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474 (1951), the decision of the Court should not be allowed to stand because the windfall to the employees as a result of the unintended dollar benefit cannot reasonably be brought within the statutory term "wages, hours and terms and conditions of employment" as to Scam in this case.

There must be reasonable limits imposed upon the concept of unilateral violations to avoid a flood of inconse-

quential cases which would disrupt the proper enforcement of the Act and unduly harass employers. Since limits have not been clearly enunciated, it is important that this Court settle the question.

CONCLUSION.

For the reasons stated this petition for certiorari should be granted.

Respectfully submitted,

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September 24, 1968.

APPENDIX A.

The relevant provisions of the amended National Labor Relations Act, Sections 8(a)(1), and 8(5) and 8(d), 29 U. S. C. Section 158, are as follows:

Section 158. UNFAIR LABOR PRACTICES.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title;

• • • • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159 (a) of this title.

• • • • •

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided . . .

• • • • •

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1967 — April Session, 1968.

No. 16599

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
v.
THE SCAM INSTRUMENT CORPORATION, *Respondent.*

Petition for Enforcement of an Order of the National Labor Relations Board.

May 15, 1968.

Before KNOCH, *Senior Circuit Judge,* and CASTLE and KILEY, *Circuit Judges.*

CASTLE, *Circuit Judge.* This case is before the Court upon the petition of the National Labor Relations Board to enforce an order of the Board issued on May 8, 1967, against the respondent, The Scam Instrument Corporation. The Board's decision and order are reported at 163 NLRB No. 39.

The Board found and concluded that Scam violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by unilaterally modifying the benefit

payment schedule of a group health insurance policy which Scam was required to carry for its employees under its collective bargaining agreement with the Union[1] representing the production and maintenance employees in Scam's Skokie, Illinois plant. The Board further concluded that the change in insurance benefits so affected constituted a modification of the collective bargaining agreement in violation of the requirements of Section 8(d) of the Act. The Board's order requires Scam to cease and desist from unilaterally modifying the existing terms and conditions of employment and from unilaterally modifying the collective bargaining agreement without complying with the provisions of Section 8(d). Affirmatively, the order requires Scam to remove, retroactively, the rider modifying the insurance benefits, to make its employees whole for any loss suffered, and to post designated notices.

The record discloses that the collective bargaining agreement between Scam and the Union covering the two year period ending September 1, 1966, contained a provision obligating Scam to maintain during such contract period certain insurance coverage for the employees represented by the Union. The particular coverages and the benefits payable were set forth in an attached schedule. The employee coverage was furnished at Scam's expense, but the monthly cost to an employee for medical and hospital services coverage for dependents was $9.82 for an employee with one family member, and $15.78 for an employee with two or more family members. Except in the case of the "major medical" coverage neither the bargaining agreement nor the insurance policy contained a "nonduplicating" provision allowing the benefits to be reduced by amounts the employee received from co-

1. Local 1031, International Brotherhood of Electrical Workers, AFL-CIO.

insurance obtained from other sources. Neither the agreement nor the policy reserved to Scam or its insurance carrier a right to modify the insurance coverage or benefits during the contract period.

In February 1965, without notification to or consultation with the Union, Scam and its insurance carrier agreed to the addition of a rider to the insurance policy. The rider issued in late February. It added a "nonduplicating" provision to the policy applicable to the medical and hospital services benefits. The rider provided for a reduction in the scheduled benefit payment in event a benefit was payable (or the item of hospital or medical service was furnished) because of like coverage of the employee or his dependent under some other group insurance or group benefit system involving participation by an employer in the form of contributions or payroll deductions. It provided like reduction in the scheduled benefit where the other benefit was due to coverage afforded by any statute.

The Union first became aware of the policy change in early May 1965, when a Scam employee reported receiving a reduced insurance payment, and upon investigation a Union reprsentative discovered that the rider had been added to the policy. Scam's personnel manager when questioned about the change promised to investigate and assured that Scam would make restitution if shortages existed and that it was unnecessary to file a grievance. On May 18, Scam asked its insurance carrier to remove the rider retroactively from the policy. The carrier complied. This action, however, was not conveyed to the Union at the time, and on June 3, the rider was reinstated at Scam's request.

On June 30, pending differences concerning insurance benefits payable to two of Scam's employees remained unresolved and a grievance was filed under the grievance

and arbitration provision of the contract. The grievance procedures culminated in the appointment of an arbitrator. The hearing before the arbitrator was postponed at the joint request of the parties pending disposition of the Board proceeding initiated by the July 14, 1965, charge filed by the Union.

Substantial evidence, on the record considered as a whole, establishes that the effect of the rider was to reduce substantially, in some instances, the insurance benefits otherwise receivable by employees where other insurance coverage existed in addition to that provided by Scam.

In support of its position in opposition to enforcement of the Board's order Scam states that the reason for the addition of the rider arose because of the increasing number of employed women who are covered by union negotiated insurance while at the same time being covered as a dependent under their husbands' union negotiated insurance and that an unintended dollar profit results from this double coverage which can in no way be considered as a bargained for employee benefit since it affects only a small number of employees and its payment does not flow from any of the traditional concerns that are normally an express subject of discussion between an employer and its employees. And on this basis, and the lack of disclosure by the record of any history of bargaining between the Union and Scam expressly directed to the factor of whether the employee insurance benefits should be either duplicating or nonduplicating, Scam argues that this particular phase of the employee insurance program does not fall within the scope of "other terms or conditions of employment" as that language has been construed and applied in cases such as *Inland Steel Co.* v. *N. L. R. B.*, 7 Cir., 170 F. 2d 247, 250-251 and *W. W. Cross & Co.* v. *N. L. R. B.*, 1 Cir., 174 F. 2d 875, 878. Scam contends

that "there is a vast difference between an employer's duty to bargain concerning the existence or the extent of benefits to be provided by an insurance plan and an employer's duty to bargain concerning the dollar profit that may be received by an employee over and above actual cost of the medical treatment received by the employee".

But here the issue presented does not concern mandatory duty to bargain. In its collective bargaining agreement with the Union Scam had agreed to the employee insurance program incorporating the specific benefit payments set forth in the schedule. The "basic" benefit payments so scheduled were not made subject to a qualification that duplicating insurance coverage would serve to effect a reduction in the amounts otherwise allowable. And once the maintenance of that insurance program and the specific benefits payable thereunder became an obligation of Scam under its collective bargaining agreement that program and those benefits constituted a part of the terms and conditions of employment for the contract period involved.

Whatever merit or intrinsic equity a "nonduplicating" feature may possess, insofar as insurance programs maintained by different employers are concerned, is beside the point. The benefits here payable were frozen as a term or condition of employment for the contract period involved absent mutual consent of the contracting parties to their alteration or qualification, or compliance with the provisions of Section 8(d). They were not subject to the unilateral reduction Scam effected, without notice to or consultation with the Union, by means of the rider it requested of its insurance carrier. The reductions so effected were not without substantial impact although they affected only those of the employees who were the beneficiaries of additional employer-participating coverage and who happened to incur medical or hospital expenses

covered by both of the insurance programs. We are of the opinion that the Board was correct in concluding that the unilateral change in benefits effected by Seam constituted an unfair labor practice violative of Section 8(a)(5) and (1) and of Section 8(d) of the Act.

And, the Board's power to entertain the charges and to afford a remedy for the unfair labor practice found to exist was not precluded by the availability or the invocation of the contract's grievance and arbitration provisions. *Carey* v. *Westinghouse,* 375 U. S. 261; *N. L. R. B.* v. *Acme Industrial Co.,* 385 U. S. 432.

Accordingly, it is ordered that the order of the Board be enforced.

ENFORCEMENT ORDERED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit, Chicago, Illinois 60604.

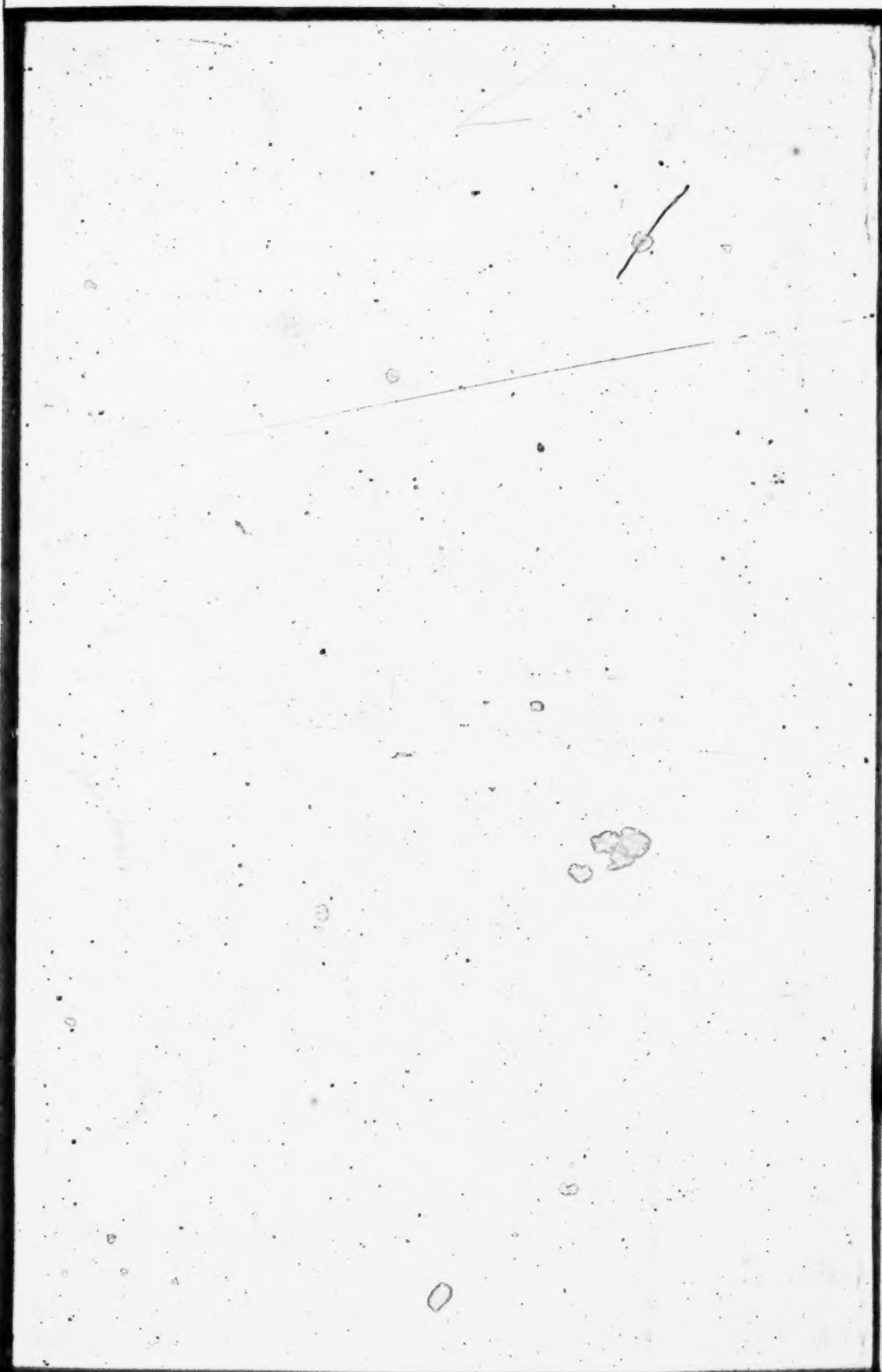
Wednesday, June 26, 1968.

Before

Hon. Latham Castle, Chief Judge
Hon. John S. Hastings, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Commings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

National Labor Relations Board, *Petitioner,* vs. The Scam Instrument Corporation, *Respondent.*	Petition for enforcement of an order of the National Labor Relations Board.
No. 16599	

IT IS ORDERED by the Court, En Banc, that the petition for rehearing En Banc in this cause be and the same is hereby denied.



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OCTOBER TERM, 1968.

No. 554

THE SCAM INSTRUMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUPPLEMENTAL APPENDIX.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE SCAM INSTRUMENT CORPORATION, AND LOCAL 1031, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	Case No. 13-CA-7097

DECISION AND ORDER.

On June 29, 1966, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

1. The Respondent has requested oral argument. This request is hereby denied because the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, The Scam Instrument Corporation, Skokie, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein.

1. Add the following as paragraph 1(d) of the Order:

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

2. Substitute "WE WILL" for "WE HAVE TAKEN STEPS to" in the first indented paragraph of the Notice.

3. Add the following as the fourth indented paragraph of the Notice:

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

Dated, Washington, D. C., March 8, 1967.

FRANK W. MCCULLOCH,

Chairman,

JOHN H. FANNING,

Member,

SAM ZAGORIA,

Member,

(SEAL) *National Labor Relations Board.*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

THE SCAM INSTRUMENT CORPORATION, AND LOCAL 1031, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	Case No. 13-CA-7079

TRIAL EXAMINER'S DECISION.

(Filed June 29, 1966.)

STATEMENT OF THE CASE.

This case was heard before me in Chicago, Illinois, on May 2 and 3, 1966, on complaint of General Counsel of the Board[1] alleging, and answer of Respondent denying, violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, 29 U. S. C. Sec. 151 *et seq.*, as amended ("Act"). All parties appeared and were represented throughout by counsel or other agent, who were afforded full opportunity to present their evidence and contentions, file briefs, and propose findings of fact and conclusions of law. Subsequent to the hearing, briefs were received from General Counsel and Respondent, and the latter also filed proposed findings and conclusions. These, together with the evidence and the parties' contentions, have been carefully considered.

1. Issued through the Board's Regional Director for the Thirteenth Region on December 15, 1965, upon charge filed by the above Union on July 14, 1965. Unless otherwise specified, all dates are 1965.

Upon the entire record,[2] I make the following:

Findings and Conclusions.

I. Jurisdiction; Respondent's Business; Labor Organization Involved.

At all material times, Respondent The Scam Instrument Corporation ("Scam," "Employer," "Respondent") has been and is an Illinois corporation with an office and place of business in Skokie, Illinois, engaged in manufacture, sale, and distribution of electrical panel systems. During the 12-month representative period immediately preceding issuance of the complaint, Respondent in the course of its said business operations manufactured, sold and distributed at said plant products valued in excess of $1,000,000, of which over $1,000,000 worth were shipped therefrom in interstate commerce directly to states other than Illinois; and during the same period, Respondent also purchased, transferred, and delivered to its said plant goods and materials valued in excess of $1,000,000, of which over $1,000,000 worth were transported thereto directly in interstate commerce from states other than Illinois. I find that at all material times Respondent has been and is an employer engaged in commerce, with its operations affecting Commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

I find that at all material times Local 1031, International Brotherhood of Electrical Workers, AFL-CIO ("Union"), Charging Party herein, has been and is a labor organization within the meaning of Section 2(5) of the Act.

I find that assertion of jurisdiction in this case is proper.

---

2. Transcript hereby corrected in respect to certain obvious and typographical errors listed in attached Appendix "A".

II. The Alleged Unfair Labor Practices.

A. *Issues.*

The issues presented are (1) whether Respondent violated Section 8(a)(5) and (1) of the Act, by unilaterally modifying a subsisting collective agreement between itself and the Union and by changing existing terms and conditions of employment • • • *viz.*, reducing the hospitalization insurance coverage provision of the collective agreement • • • without complying with Section 8(d) of the Act and without first notifying the Union or giving it an opportunity to bargain thereon; and (2) whether the Board may not or should not take cognizance of this case because of an arbitration provision in the parties' collective agreement and certain steps taken by the parties thereunder.

B. *Facts as Found.*

At all material times, all of Respondent's production and maintenance employees at its Skokie plant • • • excluding guards, outside truckdrivers, engineering and laboratory employees, office clerical and sales employees, employees represented by labor organizations other than the Charging Party, and foremen, executives and all other supervisors as defined in the Act • • • have constituted and constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. At all times since at least May 1, 1955, the Union has been and is the exclusive collective bargaining representative of Respondent's employees in said unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.[3]

Effective September 1, 1961 to September 1, 1963, a collective agreement existed between the Union and Scam's

3. Admitted in Respondent's answer.

predecessor, Panellit Division of I S I, Incorporated, covering employees at the Skokie plant. It is conceded that Scam succeeded to the Employer's obligations under this agreement when it acquired the Skokie plant in 1963. This collective agreement (G. C. Exh. 4) contains a provision (Article VII and Appendix "B" thereto) under which the Employer agrees to maintain at its own expense for designated employees employed over 120 days, an insurance policy with specified coverages, including hospitalization, surgical, doctor's bills, diagnostic X-ray and laboratory expenses, major medical expenses (to the extent of 75% thereof and subject to a $100 deductible), dependents' benefits (premiums payable by employees), and weekly accident and sickness benefits. A new collective agreement (G. C. Exh. 5) was entered into between the Union and Scam for the period September 1, 1963—September 1, 1966, containing an insurance provision (Article VII and Appendix "B" thereto) identical to that in the 1961-1963 agreement (G. C. Exh. 4). In accordance with wage-reopener provisions in this agreement (G. C. Exh. 5), a revised collective agreement (G. C. Exh. 6) was executed for the period September 1, 1964—September 1, 1966, which except for wages is the same as the 1963-1966 agreement (G. C. Exh. 5), including a substantially identical insurance provision (G. C. Exh. 6, Article VII and Appendix "B").[4]

Credited testimony of Donald Morrison, Midwestern District Claim Representative of New England Mutual Life Insurance Company, Scam's group insurance carrier, establishes that that insurer issued a group life, accident, hospitalization, surgical, medical, and major medical insurance policy covering Scam employees, effective Janu-

4. The only difference is that in the revised (*i.e.*, 1964-1966) collective agreement (G. C. Exh. 6, Appendix "B"), the employees' premium payments for dependents are increased approximately 30%. The coverages and benefits are identical.

ary 1, 1964. Review of that policy (G. C. Exh. 8) discloses that it is applicable to certain employees of Scam and their dependents, effective January 1, 1964, and indefinitely thereafter, premiums being payable monthly, and that coverage is in accordance with the collective agreement requirements described above. The policy contains no provision limiting payment under the "basic" (*i.e.*, hospital, surgical, and medical expenses) coverage in the event of other insurance carried by a Scam employee (or his dependent) or in the event of payment received by a Scam employee (or his dependent) under such other insurance policy. The policy contains no provision reserving to the insurer the right to change the coverages provided by the policy during the policy term, although it does provide that upon certain grounds not here applicable the insurer may terminate the policy, upon 30 days' notice, at the beginning of any policy year.

Morrison's testimony further establishes that a rider or amendment (G. C. Exhs. 7 and 9) to this policy was issued effective February 23 (although initially intended to be effective as of January 1) and removed on May 18 at Scam's request, retroactively to February 23, in practical effect erasing that rider as of its inception.[5] However, also at Scam's request, the same rider was reinstated effective June 3, since when it has continued in effect.

As explained by Morrison, corroborated by the policy provisions the health portion of the policy has two components: (1) a "basic" coverage for hospital, surgical,

5. Nevertheless, according to Morrison, claims had meanwhile been processed under the February 23 rider. The record indicates that the May 18 retroactive removal of the February 23 rider resulted in recomputation and adjustment of such interim claims, as in the case of Scam employee Thelma Adams involving a difference of $300-$400. The record also shows the existence of an unresolved grievance by Thelma Adams, presumably involving an alleged underpayment of insurance benefits under the group form (Resp. Exhs. 1-A and 1-B; G. C. Exh. 1(b)).

and medical expenses; (2) a "major medical" coverage for expenses not included in the "basic" coverage, over and above a 25% coinsurance contribution by the insured employee plus a $100 deductible charged against him.[6] Prior to institution of the rider in question, the Seam policy contained a "non-duplicating" insurance benefit payment provision (in effect requiring deduction from benefit payments under the Seam policy of insurance benefit payments received by the employee under another insurance policy) applicable only to "major medical" but not to "basic" coverage. The effect of the rider was at least to modify the existing coverage to the extent of adding a "non-duplicating" provision with regard to Seam employees' "basic" coverage. Morrison conceded that the rider thus "did affect the benefits payable under this contract [of insurance]." Respondent's counsel likewise conceded at the hearing that the rider "affected the basic benefits payable both to employees and their dependents." As indicated by Morrison, prior to the rider if a Seam employee covered by another insurance policy received $1000 under that other policy in connection with a loss covered to the extent of $500 by the Seam policy, the Seam insurer would have paid the Seam employee $500; whereas under the rider the Seam insurer would in such case[7] pay

6. Under the collective agreement, Seam pays the employee's entire insurance premium except the portion if any pertaining to the employee's dependent(s), which is paid by the employee to Seam for transmittal to the insurer.

7. At any rate in the absence of a "non-duplicating" provision in the other policy of insurance. For an illustration of the type of problem encountered when two or more insurance policies contain "non-duplicating," "excess insurance," or similar provisions, see *Davis Yarn Co.* v. *Brooklyn Yarn Dye Co.*, 293 N. Y. 236, wherein the court pointed out that a conclusion that because a loss was covered by two policies the insured could recover upon neither, is untenable in principle, since the moment either policy is held to be unenforceable the reason for invalidating the other policy ceases to exist. It has also been cautioned that conflicting provisions in

nothing to the Scam employee. The operation of the rider was illustrated through Morrison's testimony dealing with the actual cases of Scam employees Jeffrey (Jeffery) Jorgensen, and Siegert. Morrison's testimony and the insurer's claim payment worksheets pertaining to Scam employee Jeffrey's June 24-August 28 claim shows that prior to the rider Jeffrey would have been paid gross benefits of $723.90 (less the 25% coinsurance contribution and $100 deductible applicable to the "major medical" portion thereof) under the Scam policy for coverage benefits, whereas in view of the rider he was paid only $126.40; the difference being attributable to existence of another policy held by Jeffrey, regarded as "duplicating," payment under which the rider required be deducted from the Scam insurer's payment to the employee. Similarly, in the case of the August 20-September 14 claim of Scam employee Jorgensen, the latter was paid $137.40 by the Scam insurer under the rider, whereas without the rider she would have been paid $266.40; and Siegert was paid $65 after the rider,

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different policies, if enforced literally, might result in cancelling all insurance after occurrence of the very peril insured against. *Gordon* v. *Franklin Fire Ins. Co.*, 262 App. Div. 328, 28 N. Y. S. 2d 480.

8. It is thus apparent, for example, that, prior to the ridering of the Scam policy, a hospitalized Scam employee incurring "major medical" expense for which he was not fully reimbursed in view of the 25% coinsurance and $100 deductible provisions under the Scam policy, could utilize another existing insurance policy (bought by premiums paid by him or for him, but at any rate not paid by Scam) to avoid or minimize such noncovered expenses; but that, after the ridering of the Scam policy, such loss avoidance or reduction appears for practical purposes to have been foreclosed, notwithstanding the employee's payment of premiums on such other (non-Scam) policy. In such case, it might even be said that the employee, unable to obtain the advantage of insurance benefits for which he paid, was in a sense paying the premium (or perhaps more than the premium) upon the Scam policy which Scam was obligated to pay under the collective agreement.

as against $162.50 she would have been paid before the rider.[8];[9]

The rider in question (G. C. Exhs. 7 and 9) states that it was "Added to and made a part of the Group Policy" by agreement "between the Insurance Company and the Policyholder [Scam]," is an "Amendment to be attached to and made part of Group Policy" and is "to be attached to and made a part of certificates issued [to Scam employees]" under the group policy. Designated as a "Provision for Co-ordination of Benefits Under the Group Policy With Other Benefits," the rider requires "basic" coverages of the policy to be reduced to the extent of payments received by employees (or their covered dependents) under other applicable insurance coverages afforded by other policies. There is neither evidence, contention, nor indication that any of the employees for whose benefit the insurer had expressly agreed under the terms of the group policy (G. C. Exh. 8, p. 1) "to pay the benefits provided for herein," or their Union collective bargaining representative, was at any time in any way consulted or informed of the rider or of the intention to rider the policy, prior to the ridering itself. Morrison's credited testimony that the policy was ridered at Scam's request is undisputed.

Union Business Representative DeVito testified credibly and without contradition that he first became aware of the rider on May 3 or 4 upon receipt of an insurance payment shortage complaint from a Scam employee. At no time prior to then had he or the Union been appraised by Scam in any way that the policy had been amended or that amendment was in contemplation. When, after receipt of the employee complaint, DeVito went to the plant on May 5, he was given a copy of the rider by a Scam em-

9. Respondent's motion at the conclusion of the case, to strike from the record Morrison's testimony pertaining to "cost of insurance," upon which decision was reserved, is denied.

ployee, who apparently exhibited a lack of understanding of it other than that it had been distributed around February 28. Finding that the rider comprised a change in existing insurance benefits under the collective agreement, DeVito took the matter up with Quay Saylor, Respondent's supervisory agent and Manager of Manufacturing Services indicating to him that the Company had thereby unilaterally changed and violated its collective agreement (G. C. Exh. 6, Article VII, Appendix "B," and Article VIII, Section 1). Saylor stated he was unaware of the rider or the reason therefor, that the Company would make up any shortages, and that it would unnecessary to file any grievance. Further conversations between DeVito and Saylor later in May and in June were to the same effect, with Saylor ascribing the delay in disposition to the insurance carrier.[10] On July 29, the Chief Steward received a letter from Saylor, as a result of which the former filed a grievance on June 30 (as well as in mid-July and August) in order to set forth the Union's position. The foregoing testimony by DeVito was uncontradicted[11] and is credited.

* * * * *

Each of the collective agreements (G. C. Exhs. 4, 5, and 6) also contains an identical Grievance and Arbitration provision, establishing a conventional 3-step grievance procedure (Article II, Section 2) and providing (Article II, Section 3) that in the event grievance is unavailing the matter "may, at the request of either party" be arbitrated. On July 16, Union counsel directed a letter (Resp. Exh. 1-A) to Respondent's counsel in the matter of the "Grievances of Irene Schliephake and Thelma Adams," indicating he proposed to request appointment of an arbitrator by the

10. It will be recalled that Respondent on May 18 erased the rider retroactively to February 23, but on June 3 reinstated the rider.

11. Saylor did not testify, nor was his failure to do so explained; nor did Respondent call any witnesses.

Federal Mediation and Conciliation Service, which he did on July 21 specifying the issue therein as "Refusal of Company to pay hospitalization benefits in full, as required by provisions of Collective Bargaining Agreement, to Irene Schliephake and Thelma Adams, employees" (Resp. Exh. 1-B). On August 4, Union counsel designated its order of choices of arbitrators (Resp. Exh. 1-C), followed by the Federal Mediation and Conciliation Service's appointment on August 11 of David Dolnick as arbitrator of "Dispute involving: Hospitalization Benefits—I. Schliephake and T. Adams." (Resp. Exh. 1-D.) After requesting the parties on August 12 to agree on a date for arbitration (Resp. Exh. 1-E) and on August 19 fixing September 22 for that purpose (Resp. Exh. 1-F), Arbitrator Dolnick on September 15 at the "joint request" of the parties adjourned the arbitration to October 19, requesting the parties to "advise me as soon as you can whether you will proceed with this arbitration" (Resp. Exh. 1-G). A month later, on October 15, Dolnick, again at the joint request of the parties, adjourned the arbitration "without a date pending the disposition of the matter [*i.e.*, the charge resulting in the instant proceeding] now before the National Labor Relations Board," requesting the parties to "advise me as soon as you can if you desire to proceed with the arbitration hearing" (Resp. Exh. 1-H). On December 24, Union counsel directed a letter (Resp. Exh. 1-I) to Respondent pertaining to "Grievances of Robert Jeffery and Pauline Jorgensen," suggesting they be consolidated with the pending grievances of Schliephake and Adams. There is no indication of response to this letter. On February 15, 1966, Respondent's counsel wrote Arbitrator Dolnick, in response to the latter's status request (regarding the Schliephake and Adams grievances) that "the matter is also pending before the NLRB and a hearing is set on charges filed against the company for March 3, 1966. It is my understanding that

this case is carried on your docket pending notification by both parties that the matter has been resolved or by notification that the parties wish to continue with the arbitration. Our client, The Scam Instrument Corporation, has no control over this matter since the request for arbitration was made by the union to the FMCS [Federal Mediation and Conciliation Service]." (Resp. Exh. 1-J.) The parties stipulated at the hearing that no change in status has occurred since this February 15, 1966 letter of Respondent's counsel to Dolnick, nor, indeed, since Dolnick's October 15 letter to the parties. No arbitration hearing has ever been held or commenced.

C. *The parties' contentions.*

General Counsel and the Charging Party contend that Respondent's unilateral imposition of the rider to its employees' group insurance policy under the circumstances described was in violation of Section 8(a)(5) and (1) of the Act since not in compliance with requirements of Section 8(d) of the Act, and since in violation of the collective agreement and Respondent's bargaining obligation. General Counsel and the Charging Party further contend that the provisions of the collective agreement and the parties' resort to the grievance and other steps described are not a bar, as matter of law or discretion, to the prosecution of the instant proceeding.

With regard to the ridering of the policy, which is undisputed, it appears to be Respondent's contention that it had the legal right to institute the rider unilaterally, since under the rider an "employee's total [insurance] entitlement [under non-Scam as well as Scam coverage] * * * would not exceed the amount actually expended for health care" (Resp. brief, p. 2). Conceding that "respondent * * * is and was under an obligation to see that the benefits called for in Appendix B of the collective-bargaining agreement

were and are provided" (*id.*, pp. 3-4), Respondent urges that "The method by which these benefits are to be provided * * * remains a decision of management * * * respondent, in good faith, presumed that the provisions of the collective-bargaining agreement permitted the modification of the insurance contract by including the rider. * * *" (*id.*, p. 4). Respondent further contends that the collective agreement requires arbitration of this matter, it being one of "contract interpretation," that the parties invoked that procedure, and that therefore this proceeding is barred or at any rate should not be entertained by the Board as a matter of discretion. Respondent urges that the Board should defer to arbitration herein as "less complicated," and that not to do so "will tend to preempt the process of arbitration and lessen its usefulness in the settlement of labor-management disputes." (*id.*, p. 5.) Finally, Respondent contends that its obligation to bargain with the Union was satisfied by its willingness to arbitrate.

D. *Concluding findings and rationale.*

1. Respondent's unilateral modification of the collective agreement.

Effective September 1, 1964, Scam entered into a 2-year collective agreement with the Union, in effect constituting a continuation of prior agreements in previous years. Article VII of the agreement states:

> ARTICLE VII.
>
> INSURANCE.
>
> During the term of this Agreement, the Company will maintain for the employees covered by this Agreement, who have been employed 120 days, an insurance policy with a reputable insurance company with coverages and

> provisions set forth in Appendix "B" of this Agreement. The total premium for this insurance coverage shall be paid for entirely by the Company.

Pursuant to this requirement (and that of the preceding collective agreement) and the insurance coverages specified in Appendix "B" to the collective agreement, Scam supplied a group insurance policy to the employees in the unit affected by the collective agreement. Neither the collective agreement nor Appendix "B" thereto nor the group insurance policy in any way indicates that employees who are otherwise insured are exempt from the insurance benefits of the collective agreement, or that the "basic" coverages to be afforded thereby or under the group insurance policy are inapplicable to such otherwise insured employees; or that the collective agreement or group insurance policy "basic" coverages are to be applied discriminatorily or in any manner differently against otherwise insured employees than against employees not otherwise insured.

Article VIII, Section 1 of the collective agreement provides:

> ARTICLE VIII.
>
> GENERAL PROVISIONS.
>
> *Section 1. Saving Clause:* All benefits affecting the employees covered by this Agreement presently in effect, and which are not definitely referred to or changed herein, shall remain in effect during the life of this contract.[12]

Notwithstanding these requirements of the collective agreement, Respondent on February 23 unilaterally and

12. As indicated above, this provision was the same as that in the prior collective agreements, as were Article VII and Appendix "B"; and the *unridered* insurance benefits affecting the unit employees were in effect at the time of and unchanged by the September, 1964 collective agreement.

without prior notification to or consultation with the Union, placed into effect a modifying rider to its employees' existing group insurance policy and the coverages afforded thereunder, to the effect that there would thereafter be deducted from the theretofore fully payable "basic" benefits of the policy, sums received by employees under other applicable insurance policies held by employees and not involving Scam. When this rider came to the attention of the Union and it complained to Scam about it, Scam on May 18 removed the rider retroactively to its February 23 inception date with recomputation and adjustment of benefits on claims paid in the interim. However, on June 3, again without notice to or consultation with the Union, Scam unilaterally reimposed the same rider. That this rider effected a substantial change in policy benefits, and therefore in a term and condition of employment,[13] is not open to doubt.[14, 15]

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13. *Inland Steel Company*, 77 NLRB 1, enforced, 170 F. 2d 247 (C. A. 7), cert. denied, 336 U. S. 960; *W. W. Cross & Company, Inc.*, 77 NLRB 1162, enforced, 174 F. 2d 875 (C. A. 1).

14. Respondent appears to take the position that since the insurance benefits required by Appendix "B" of the collective agreement "were in effect before and after" the rider, the rider effected no change therein. (Resp. brief, p. 5, 3d paragraph.) If this is Respondent's contention, then it is to make things that are different appear to be the same. If the insurance coverage remained the same after as well as before the rider, then—contrary to the explicit, credited testimony of Morrison—the rider was pointless and had no effect. It also would have been pointless, in that event, for Respondent to reinstate the rider on June 3 after having withdrawn it on May 18. There can be no doubt that the rider deprives otherwise insured Scam employees of cost-free insurance benefits supplied by Scam under the collective agreement to employees who are not otherwise insured. It is difficult to see how the relations between a Scam employee and his personal insurer have any bearing upon the nature or extent of Scam's contractual obligation to provide insurance under the collective agreement.

15. Unlike the situation as viewed by the dissenting Board members in *Westinghouse Electric Corp.*, 156 NLRB No. 96, 61 LRRM 1165, the actual operation of this rider, as demonstrated in the testimony of Morrison, establishes that its effects cannot be regarded as *de minimis*. As indicated *supra*, n. 8, otherwise insured

Not only was Respondent's obligation clear to supply insurance benefits in accordance with the requirements of the collective agreement, without distinction between employees not otherwise insured and those otherwise insured, but, having supplied employees with the coverages set forth in the group policy, Respondent was not at liberty—either under Article VII or Article VIII, Section 1, of the collective agreement—to withdraw or modify that coverage. Respondent also had the further obligation under the collective agreement not to act unilaterally in the premises, without notifying or consulting with the Union.

I find that Respondent's unilateral imposition on February 23 and its subsequent unilateral reinstatement on June 3 of the rider in question were in violation of its subsisting collective agreement with the Union and its legal obligation to bargain with the Union as the designated exclusive collective bargaining representative of its unit employees.[16]

In amplification of the requirement to bargain collectively imposed by Section 8(a)(5) of the Act, Section 8(d) provides, in material part (emphasis supplied):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet

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employees were, at the very least, by virtue of the rider, stripped of the possibility of applying benefits received by them from another insurer upon another policy for which such employees were themselves paying premiums, toward reduction of the incomplete coverage afforded by the "major medical" portion of the Scam group policy—*i.e.*, the 25% coinsurance "contribution" and the $100 deductible charged against the Scam employee's benefits under the Scam policy. It is a matter of common knowledge that individuals purchase more than one insurance policy to avoid or minimize just such losses or inadequate benefits resulting from coverage lacunae of this type. Further in contrast to *Westinghouse*, the change effected by the rider was imposed by Respondent itself.

16. *Cf. Century Papers, Inc.*, 155 NLRB No. 40, 60 LRRM 1320; *C & C Plywood Corporation*, 148 NLRB 414, 57 LRRM 1015; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1415.

at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, *or any question arising thereunder* • • •. *Provided, That where there is in effect a collective-bargaining contract* • • • *the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification*—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof • • •;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service • • • and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes • • •."

There can be no question, and there is no contention, here that Respondent wholly omitted to comply with these requirements of the Act. I find that Respondent's unilateral imposition on February 23 and its subsequent unilateral reinstatement on June 3 of the rider were also in violation of the requirements of Section 8(d) of the Act. *Kinard Trucking Company, Inc.*, 152 NLRB No. 42, 59 LRRM 1104.

Respondent's contention that it is to be freed of the consequences of its unilateral actions because—according to its *ipse dixit* on brief—it "in good faith, presumed that the provisions of the collective-bargaining agreement permitted the modification of the insurance contract by including the rider" (Resp. brief, p. 4), cannot be accepted. Action taken in ignorance of the law, even in good faith, is no defense to violation of the Act. *IUE, Local 613* v. *N. L. R. B.*, 328 F.

2d 723, 727 (C. A. 3); *N. L. R. B.* v. *Clearfield Cheese Co., Inc.*, 322 F. 2d 89, 93 (C. A. 3); *Taylor Forge & Pipe Works* v. *N. L. R. B.*, 234 F. 2d 227, 231 (C. A. 7), cert. denied, 352 U. S. 942; *Old King Cole, Inc.* v. *N. L. R. B.*, 260 F. 2d 530, 532 (C. A. 6). " * * * the statutory protection extended to a blameless employee is a firm and clear guarantee, not one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information" *N. L. R. B.* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91 (C. A. 4), cert. denied, 347 U. S. 935. Furthermore, unilateral changes in terms and conditions of employment constitute violation of the bargaining obligation even in absence of bad faith. *N. L. R. B.* v. *Katz*, 369 U. S. 736, 742-743. Nor is there merit to Respondent's contention that, under the circumstances shown and further to be discussed, its obligation to bargain with the Union was satisfied by its alleged willingness to arbitrate.[17]

I find and conclude that by its unilateral imposition of the rider on February 23 and its reinstatement thereof on June 3, Respondent violated Section 8(a)(5) and (1)of the Act.[18] *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217; *N. L. R. B.* v. *Katz*, 369 U. S. 736, 742-743; *Sioux City Bottling Works*, 156 NLRB No. 41, 61 LRRM 1040.

2. The arbitration contention.

The parties' collective agreement contains a conventional 3-step grievance procedure and a provision (Article II, Section 3) that if that fails "the matter *may*, at the request of either party" (emphasis supplied) be arbitrated. This

17. Although this might be indicative of a preference of forum, it would hardly bear on Respondent's motivation. *Cf. Miranda Fuel Company, Inc.*, 140 NLRB 181, 190 n. 22 (enforcement den. on other gr., 326 F. 2d 172 (C. A. 2)).

18. Respondent's proposed Findings of Fact "1" and "2" and its proposed "Conclusions of Law" (Resp. brief, p. 6) are accordingly disallowed.

is thus a permissible, not a required, procedure under the collective agreement.[19] The record establishes that under this procedure an arbitrator was appointed specifically with reference to the unresolved grievances of employees Schliephake and Adams only. There is no evidence that at any time any matter other than these individual grievances of employees Schliephake and Adams was tendered for arbitration. The complaint in the instant proceeding is not limited to (nor does it even mention) those particular grievances; on the contrary, it pertains to *all* unit employees and deals with various alleged violations of the Act relating not merely to all of the unit employees but involving execution of the Board's responsibility to enforce the Act in the public interest—matters not tendered for arbitration, if, indeed, they effectively could be.[20]

The processing of the indicated specific grievances of employees Schliephake and Adams through the grievance and

19. There is no evidence that the parties, or either of them, have agreed to be bound by arbitration or have executed the usual arbitration submissions or consents preceding arbitration. At best, or worst, the two grieving employees started to invoke an arbitration procedure which they (as well as Respondent) have not seen fit to pursue. Such action, or more accurately, perhaps, passivity, has been regarded as not barring action by the Board. *N. L. R. B.* v. *Thor Power Tool Company*, 351 F. 2d 584, 587 (C. A. 7). The Board has not eschewed exercise of jurisdiction merely because a party had a contractual right, as distinct from duty, to arbitrate. *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1414 n. 14; *Milk Drivers & Dairy Employees, Local 546, Teamsters (Minnesota Milk Co.)*, 133 NLRB 1314, enforced, 314 F. 2d 761 (C. A. 8); *Newspaper Guild of Buffalo*, 118 NLRB 1471. Section 10(a) of the Act explicitly provides that the power of the Board to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *"

20. "[The Board] cannot, in giving effect to arbitration agreements, neglect [its] function of protecting the rights of employees granted by [the] Act." *Raytheon Company*, 140 NLRB 883, 886 (enforcement den. on other gr., 326 F. 2d 471 (C. A. 1)). See also, *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506, 1508-1509.

arbitration process is in no way preclusive of, a bar to, or inconsistent with prosecution by the Union—to say nothing of General Counsel—of the vindication of the rights of all employees to relief from the effects of Respondent's described unilateral actions in violation of the Act.[21] Moreover, there suggests itself a doubt as to the efficacy, under the circumstances, of the grievance-arbitration procedure even so far as individual grievants Schliephake and Adams are concerned, since there is no indication that Scam's insurer is a party to the proposed arbitration or that it has agreed to be bound by the outcome. Furthermore, there is no persuasive showing of real intention or desire on Respondent's part to pursue arbitration even as to those particular grievances. Thus, as recently as February 15, 1966, Respondent's counsel wrote the arbitrator—much of whose correspondence with counsel for the parties, as shown in the record, appears to have been devoted to an endeavor to ascertain whether they really wanted to proceed to arbitration—that the matter was pending before the Board, further indicating it to be Respondent's "understanding that this case is carried on your docket pending notification by both parties that the matter has been resolved or by notification that the parties wish to continue with the arbitration" and that Scam "has no control over this matter since the request for arbitration was made by the union. * * *" This hardly connotes determination by Respondent to pursue the arbitration route which is currently here insists was required to be or at least should have been pursued.[22] Fur-

21. *Cf. C & S Industries, Inc.*, 158 NLRB No. 43, slip op. at pp. 7-8, 62 LRRM 1043; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506; *Ford Motor Company*, 131 NLRB 1462.

22. It is, rather, suggestive of walking in dual directions, by urging the arbitrator not to proceed with arbitration because of the pendency of Board action, while urging the Board not to proceed because of the pendency of arbitration. Such ambivalence should not receive encouragement. *Cf. LeRoy Machine Co., Inc.*, 147 NLRB 1431, n. 2.

thermore, since not only the parties but the arbitrator himself have deferred to the Board herein, there is no reason, all other circumstances being considered, why the Board should not expeditiously proceed to definitive determination of the basic issues upon the merits.[23]

Respondent urges on brief that the matter before the arbitrator was one of "contract interpretation," requiring or at least favoring arbitration as a forum; that since arbitration here would be "less complicated," the Board should in the exercise of discretion defer thereto and withhold exercise of jurisdiction herein; and that, in any event, since the parties have invoked arbitration they are required to proceed therewith. What has already been said answers much of this contention. It has been noted that the only matters tendered for arbitration were the specific individual grievances of employees Schliephake and Adams. Further, it may be doubted whether arbitration here would be "less complicated," since, it being thus limited, it would at best possibly dispose only of those two individual grievances—even that being clouded by doubt because of the absence of the Scam insurer as a party to the arbitration—and leave the basic issues unresolved. Such basic issues can, however, and in my view should, now, without further delay, be resolved by the Board in this single proceeding—a procedure "less complicated," to borrow Respondent's phrase, than peripatetic and costly individual grievances and arbitrations.[24] Moreover, it would seem that arbitration cannot be regarded as more expeditious in a case where the parties themselves have repeatedly adjourned and not gone forward with the arbitration, and have themselves elected to

23. *Cf. Local 457, Rubber Workers (Kentile, Inc.)*, 147 NLRB 980, 981.

24. *Cf. Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1415-1416. In this connection, Respondent's apparent failure to take any action on the Jeffrey and Jorgensen grievances, or to agree to their consolidation for arbitration as suggested by Union counsel on December 24 (Resp. Exh. 1-I), may be of interest.

defer arbitration until the outcome of the instant proceeding, which presumably will dispense with the necessity for any arbitration. This is not to derogate from the "hospitable acceptance"[25] which the Board accords to the arbitration process in pursuance of the public policy favoring labor-management arbitration in appropriate situations, such as where an arbitration determination not inconsistent with the policies of the Act, involving parties who have agreed to be bound thereby, has actually been made, after a fairly conducted arbitration hearing free from significant procedural taint;[26] or where there is involved a mere question of contract interpretation, singularly susceptible to resolution through the arbitration process unequivocally selected by the parties.[27] Here, however, no arbitration determination or hearing has occurred, and there is involved no such question of contract interpretation, let alone a question of contract interpretation singularly appropriate for arbitration.[28] Rather, there is involved the public legal question—under facts for practical purposes undisputed—as to whether certain conduct of Respondent constitutes unfair labor practices in violation of the Act.[29] Especially because of the legislatively assigned public responsi-

25. *International Harvester Co.*, 138 NLRB 923, 927, enforced *sub nom. Ramsey* v. *N. L. R. B.*, 327 F. 2d 784 (C. A. 7), cert. denied, 377 U. S. 1003.

26. *Cf. Spielberg Manufacturing Company*, 112 NLRB 1080; *Precision Fittings, Inc.*, 141 NLRB 1034.

27. *Cf. Montgomery Ward & Co.*, 137 NLRB 418, 423; *Hercules Motor Corporation*, 136 NLRB 1648, 1652. That the Board may properly exercise jurisdiction to remedy unfair labor practice even where a question of contract interpretation exists, see *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197.

28. *Cf. C & S Industries, Inc.*, 158 NLRB No. 43, 62 LRRM 1043; *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506, 1509; *Raytheon Company*, 140 NLRB 883, 885 (enforcement den. on other gr., 326 F. 2d 471 (C. A. 1)); *Monsanto Chemical Company*, 130 NLRB 1097.

29. *Cf. Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Smith Cabinet Manufacturing Company, Inc., supra*, n. 28.

bilities resting upon the Board for enforcement of the Act, the question of whether Respondent has engaged in unfair labor practices in violation of the Act is a question not only more appropriately, but one which is required to be, determined by the Board rather than a private arbitrator.[30] At any rate, it would be an anomaly to conclude that the Board lacks power to decide such a case or that it must surrender or defer its jurisdiction therein to a private arbitrator, even if—as is not the situation here—the parties have clearly and unequivocally stipulated to go forward with an arbitration hearing involving the same issue as is before the Board.

For all of these reasons, I find and conclude that the grievance-arbitration provisions of the collective agreement and the parties' described actions, under the circumstances of this case, do not constitute a mandatory bar nor furnish persuasive discretionary basis for rejection or withholding of jurisdiction, to the maintenance and disposition of the instant proceeding. Respondent's motion at the conclusion of the case, upon which decision was reserved, to dismiss the complaint upon that ground[31] is accordingly denied.[32]

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30. It has been stated of Board proceedings that "The controversy is not to vindicate a private right, but to give effect to the public policy as defined by Congress, *viz.:* the prevention of unfair labor practices which, by causing and increasing industrial strife, obstruct the free flow of interstate commerce. *Amalgamated Utility Workers* v. *Edison Co.*, 309 U. S. 261, 266, 267, 268. * * *" *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306, 312 (C. A. 7). See also, *C & S Industries, Inc.*, 158 NLRB No. 43, 62 LRRM 1043; *Cloverleaf Division of Adams Dairy Co., supra,* n. 29, at 1416.

31. Raised by way of affirmative defense interposed through amendment of Respondent's answer at the conclusion of the hearing.

32. Act, Sec. 10(a), quoted *supra,* n. 19; *C & S Industries, Inc.*, 158 NLRB No. 43, 62 LRRM 1043; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506. The fact that an arbitrator has been appointed, without more, does not alter this result; nor would even

Upon the foregoing findings and the entire record, I state the following:

III. Conclusions of Law.

1. The Scam Instrument Corporation, Respondent herein, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 1031, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Assertion of jurisdiction herein is proper.

4. All production and maintenance employees employed by Respondent at its Skokie, Illinois plant, excluding guards, outside truckdrivers, engineering and laboratory employees, office clerical and sales employees, employees currently represented by other labor organizations, and foremen, executives and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. By its actions, as described above in Section II hereof, on February 23, 1965, in unilaterally placing into effect, and again on June 3, 1965 unilaterally reinstating, a modifying rider to its employees' group insurance policy supplied by Respondent pursuant to its subsisting and prior collective agreements with the Union, Respondent charged existing terms and conditions of employment of its said unit employees.

6. Respondent's February 23 and June 3, 1965, actions as set forth in Conclusion "5," *supra*, constituting modifi-

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clear, express agreement and manifested determination—not present here—of the parties to proceed with arbitration, since parties cannot by their private agreement oust the Board of its power and duty to carry out its public responsibilities. "* * * the jurisdiction of the Board, once established in all other respects, is not to be affected by an agreement entered into by private parties. * * *" *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306, 312 (C. A. 7).

cations of its subsisting collective agreement with the Union dated September 1, 1964, were each taken by Respondent without compliance with and in violation of the requirements of Section 8(d) of the Act.

7. By its acts and each of them as set forth in Conclusions "5" and "6," *supra,* Respondent failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the duly designated exclusive collective bargaining representative of Respondent's said unit employees, thereby engaging in unfair labor practices in violation of Section 8(a)(5) of the Act.

8. By its acts and each of them as set forth in Conclusions "5" and "6," *supra,* Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of rights guaranteed to them in Section 7 of the Act, thereby engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent's separate defense is insufficient and should be dismissed.

IV. The Remedy.

Having found that Respondent has engaged and is continuing to engage in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent cease and desist from unilaterally modifying existing terms or conditions of employment of its unit employees without prior notification and reasonable opportunity to the unit employees' Union to bargain thereon; and cease and desist from modifying its subsisting collective agreement without complying

with the requirements of Section 8(d) of the Act. I shall further recommend that Respondent be required to withdraw or remove, retroactively to June 3, 1965, the modifying rider which on June 3, 1965 it unilaterally reinstated affecting its unit employees' group insurance policy; and, further, that Respondent be required to make whole its employees for any losses, diminutions, or underpayments of insurance benefits suffered by said employees by reason of Respondent's action in imposing that rider on February 23, 1965, as well as by its action in reinstating that rider on June 3, 1965 (after having withdrawn or removed it on May 23, 1965 retroactively to February 23, 1965), by payment to its employees of the differences between moneys received by them under said rider and moneys which they would have received under said group insurance policy in the absence of said rider, plus interest[33] thereon from the date when such payments would normally have been made to the date of payment in accordance with the terms of the Recommended Order herein. Respondent should also be required to make available its books and records, as well as in turn to require or request its group insurer to make available to Respondent as its policyholder said insurer's books and records, for the purpose of these computations.

I shall also recommend that Respondent be required to post an appropriate notice.

Upon the foregoing findings and conclusions and upon the entire record, and pursuant to Section 10(c) of the Act, I make the following:

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33. *Cf. Isis Plumbing & Heating Co.*, 138 NLRB 716.

RECOMMENDED ORDER.

IT IS HEREBY ORDERED that The Scam Instrument Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally and without prior notice and reasonable opportunity to bargain, to Local 1031, International Brotherhood of Electrical Workers, AFL-CIO, as the duly designated exclusive collective bargaining representative of a unit of Respondent's employees appropriate for that purpose, changing existing terms and conditions of employment of said employees or modifying the subsisting collective agreement between Respondent and said Union.

(b) Modifying its subsisting collective agreement with said Union without compliance with the requirements of Section 8(d) of the Act.

(c) Failing or refusing to notify and bargain with said Union prior to making or purporting to make any modification of or change in any subsisting collective agreement with said Union, or in the terms and conditions of employment of said unit employees.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Forthwith withdraw and remove, retroactively to June 3, 1965, the modifying rider which Respondent on June 3, 1965 unilaterally placed into effect affecting its unit employees' group insurance policy.

(b) Make whole each of its employees for any losses, diminutions, or underpayments of insurance benefits suffered by said employees by reason of Respondent's imposition of said rider on February 23, 1965, as well as by Respondent's reinstatement of said rider on June 3, 1965 (after having withdrawn or removed it on May 23, 1965

retroactively to February 23, 1965), by payment to said employees of sums of money equal to the differences between what they received under said rider and what they would have received under said group insurance policy in the absence of said rider, plus interest thereon from the date when such payments would normally have been made to the date of payment in accordance with the terms of this Recommended Order.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all books, reports, files, correspondence, and all other records necessary to analyze and compute the amounts due under the terms of this Decision; and also, require or request its group insurer to make available to Respondent as its policyholder said insurer's books, reports, files, correspondence, and all other records necessary to analyze and compute the amounts due under the terms of this Decision, the foregoing likewise to be made available by Respondent to the Board or its agents for examination and copying.

(d) Upon request, bargain collectively with Local 1031, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective bargaining representative of Respondent's employees in the unit found appropriate with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(e) Post at its plant in Skokie, Illinois, copies of the notice attached hereto marked "Appendix B."[34] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by

34. In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "A Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from receipt of this Decision and Recommended Order, what steps have been taken to comply therewith.[35]

I further recommend that Respondent's separate defense in its answer as amended at the conclusion of the hearing be and the same is hereby dismissed.

Dated at Washington, D. C. June 29, 1966.

STANLEY N. OHLBAUM
Trial Examiner

35. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX "A"

Transcript Corrections

Correc. tion No.	Transcript Page(s)	Transcript Line(s)	Corrected From	Corrected to
1	3	15	Procedure as	Procedure; and as
2	3	16	9(b)	10(b)
3	3	19	the Civil	Civil
4	4	24	one	any
5	8	17	too	took
6	9	5-6	1-C. The	1-C, the
7	9	10-11	1966. The	1966, the
8	9	16	indefinitely	indefinitely
9	9	25	Oour	Our
10	12	6	arbittrable	abitrable
11	15	4	document	documents
12	20	21	idea, of what, if any contractual	idea of what, if any, contractual
13	24	5	of matters	on matters
14	24	22	explanation	exploration
15	25	4	attain	apprehend
16	35	3	now	not
17	35	4	alternative	ultimate
18	38	1	prima facially	prima facie, at least,
19	42	20	elibible	eligible
20	53	1	employees'	employee's
21	53	4	employers	employer's
22	53	9	employee's	employer's
23	53	10	expense	experience
24	53	14 & 17	affect	effect
25	54	2	affect	effect
26	55	11	hom	him
27	60	1	expense of the insurance	experience of the assureds

Correc. tion No.	Transcript Page(s)	Transcript Line(s)	Corrected From	Corrected to
28	60	4	As well as	As well as to
29	60	5	insurance	insureds
30	60	16	its	his
31	70	19	issues as	witness has
32	70	24	was incepted	incepted
33	77	11	not	now
34	78	6	And	In
35	88	24-25	what was related	what it was related to
36	92	13	was	is
37	92	23	entrance or interest	interest
38	95	16	bjcetion	objection
39	96	20	on to	on
40	96	23	to employees	of employees
41	98	24	1-B	1-D
42	107	20	you	your
43	107	22	he	you
44	108	5	to	as to
45	112	2	affect	effect
46	112	21	TRIAL EXAMINER	TRIAL EXAMINER (to Mr. Kronenberg):
47	118	15	rules and regulations series 8	Rules and Regulations Series 8

APPENDIX "B".

NOTICE TO ALL EMPLOYEES.
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act (as amended) we hereby notify our employees that:

WE HAVE TAKEN STEPS to withdraw, cancel, and remove, retroactively to June 3, 1965, the rider to your group insurance policy which on June 3, 1965 we reinstated into effect. All payments of insurance benefits made to employees under that rider, as well as all payments made under the rider of February 23, 1965, will be recomputed so that all employees will be paid the differences between benefit payments received by them under the rider and the benefit payments they would have received if the rider had not been in effect, plus interest.

WE WILL NOT, without prior notice to, and giving reasonable opportunity to bargain by, your Union, Local 1031, International Brotherhood of Electrical Workers, AFL-CIO, change your terms and conditions of employment, such as the insurance benefits under your group insurance policy.

WE WILL NOT modify or attempt to modify our collective agreement with you, without giving advance notice to your Union, offering to bargain, and in other respects complying with the requirements of Section 8(d) of the National Labor Relations Act as amended.

THE SCAM INSTRUMENT CORPORATION
Employer

Dated ..... By .....
Representative Title

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 881, United States Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604 (Tel. No. 828-7597).

LIBRARY
SUPREME COURT, U. S.

No. 554

FILED
OCT 23 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE SCAM INSTRUMENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 12-17) is officially reported at 394 F. 2d 884. The Board's decision and order (Pet. App. 1-30) are reported at 163 NLRB No. 39.

JURISDICTION

The decision of the court of appeals was rendered on May 15, 1968 (Pet. 12). A petition for rehearing

en banc was denied on June 26, 1968 (Pet. 18). The petition for a writ of certiorari was filed on September 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer violates his bargaining obligation under the National Labor Relations Act when, during the term of a collective bargaining contract, he changes the insurance benefits which his employees were entitled to under the contract without notifying or consulting with the union representative.

STATUTE INVOLVED

Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at page 11 of the petition; section 8(d) of the Act, in pertinent part, is as follows:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collec-

tive-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

STATEMENT

The employees at the Company's Skokie, Illinois plant have been represented by Local 1031, Interna-

tional Brotherhood of Electrical Workers, AFL-CIO since 1955 (Pet. App. 5). The collective bargaining agreement between the Company and the Union for the two-year period ending September 1, 1966, contained a provision obligating the Company to maintain specified insurance coverage for the employees (Pet. App. 6-7). The kinds of coverage and the benefits payable were set forth in an attached schedule (Pet. App. 6). At an employee's election, his dependents could also be covered at a stated monthly premium to be paid by him through the company.

In February 1965, without notification to or consultation with the Union, the Company and its insurance carrier agreed to add a "non-duplicating" rider to the medical and health service benefits payable under the policy (Pet. App. 7-8; B.A. 77-79, 84-88).[1] Under this rider, benefit payments could be reduced in the event the employee or his dependent had similar coverage under another group insurance system involving employer contributions, so that the employee would not receive more than 100% of his medical expenses in benefits[2] (Pet. App. 8-10).

The Union first became aware of the policy change in early May 1965, when a Company employee reported receiving a reduced insurance payment (Pet. App. 10). The Union complained to the Company's manager, who promised to investigate the matter

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[1] References designated "B.A." are to the appendix to the Board's brief in the court below.

[2] Whether the reduction would be made under the employee's plan or his dependent's is determined according to stated priorities (B.A. 87).

(Pet. App. 11). On May 18, the Company asked the insurance carrier to remove the rider retroactively from the policy (Pet. App. 7). The carrier complied, but the Union was not told of its action (Pet. App. 11). On June 3, the rider was reinstated at the Company's request, but again the Union was not notified or consulted about the change (Pet. App. 11).

The Board concluded that the Company's addition of the non-duplicating rider to the insurance policy without first notifying or consulting with the Union constituted a unilateral change in the terms and conditions of employment of the Company's employees, in violation of Section 8(a)(5) and (1) of the Act. The Board also concluded that the Company's action violated Section 8(d), because the addition of the rider constituted a modification of the collective bargaining contract without compliance with the procedures set forth in that section. (*Supra*, pp. 2-3; Pet. App. 17-19.) The Board ordered the Company to cease and desist from the unfair labor practices found, to remove the non-duplicating rider retroactively, to reimburse employees for any medical benefits they lost as a result of the rider, and to post appropriate notices (Pet. App. 28-30, 2).

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order (Pet. 12-17).

ARGUMENT

The obligation to bargain collectively with respect to "wages, hours, and other terms and conditions of employment," which Sections 8(a)(5) and 8(d) of

the Act impose on an employer, carries with it the duty to refrain from taking action on those subjects without first notifying and consulting with the employees' union representative. It is undisputed that, after the Company and the Union agreed to an insurance program for the employees and incorporated that program in a collective agreement, the Company unilaterally added a rider to the insurance policy which had the effect of changing the insurance benefits payable to the employees. Such unilateral action violated Sections 8(a)(5) and 8(d) of the Act. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747 (1962); *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421, 425-430 (1967).

The company contends (Pet. 6), however, that the non-duplicating rider was not a matter covered by the collective bargaining contract, since it "in no way reduced the amount of coverage available to Scam employees, but simply eliminated the unintended dollar profit paid to a small minority of employees" who had double insurance coverage. But the contract set forth in detail the specific benefit payments to which employees were entitled under given circumstances, and, insofar as medical and health service was concerned, there was no provision for reduction in benefits in the event of coverage under other insurance plans. However described, the effect of the Company's unilateral addition of the non-duplicating rider was to introduce a qualification not previously specified, and to reduce the total payments which certain employees would otherwise have received under the orig-

inal plan (Pet. App. 8-10). Thus, the Board—which was empowered to construe the collective agreement in deciding this unfair labor practice charge, *National Labor Relations Board* v. *C & C Plywood Corp.*, *supra*, at 428—correctly concluded, as the court below found, that the agreement covered the insurance benefits which the Company changed, and hence the Company could not lawfully make that change without first bargaining with the Union.[3]

Thus, while the employer's desire for the rider can be understood and even approved, he went about imposing it in the wrong way. There is no issue here worthy of the Court's consideration.

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[3] Bargaining over the reduction would not necessarily have been a mere formality. The Company apparently wished to save premium expense by improving its claims record on the insurance policy. The Union might well have acquiesced in the rider, but sought some compensating advantage, for example a reduction in the premiums its members paid for covering their dependents under the Company's group policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

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National Labor Relations Board.

OCTOBER 1968.

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